Supreme Court, U.S.
FILED

03 159 JUL 30 2003

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No. 03-

IN THE

Supreme Court of the United States

SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (*formerly known as* SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court may deny compensation for a categorical taking by invoking a new and expansive conception of the public trust doctrine, thereby disregarding the limits placed by this Court's regulatory takings decisions on the definition of a background principle of law.

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PETITION FOR A WRIT OF CERTIORARI

Sam B. McQueen respectfully petitions this Court for a writ of certiorari to review the judgment in this action of the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at 580 S.E.2d 116 and is reprinted in the appendix hereto ("Pet. App.") at 1a.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on April 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the Constitution of the United States declares: "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment, section 1, provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law . . . ."

INTRODUCTION

The Supreme Court of South Carolina has defied this Court's order to reconsider this regulatory takings case in light of *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001). On remand, the South Carolina court directed the parties to brief and argue unrelated issues and denied compensation once again for an admitted "total taking." Pet. App. 4a. By denying compensation based on a new and expansive conception of the public trust doctrine, the lower court disregarded the limits placed by this Court on the definition of a background principle of law.

In *McQueen* v. *South Carolina Department of Health and Environmental Control, Office of Ocean & Coastal*

Resource Management, 533 U.S. 943 (2001), the Court issued an order granting certiorari, vacating the judgment of the South Carolina court, and remanding "for further consideration in light of *Palazzolo* . . . ." *Id.* at 8a. Rather than complying with this grant-vacate-and-remand ("GVR") order, the South Carolina court directed the parties to brief unrelated issues; denied a motion to amend the briefing order so that the extent of *Palazzolo's* effect on the initial judgment could be addressed; and rested its final judgment on the public trust doctrine, which the court applied in this case for the first time on remand, without reconciling its denial of compensation with the holding or reasoning of *Palazzolo*.

The South Carolina Supreme Court's judgment is irreconcilable with this Court's regulatory takings decisions. The South Carolina court acknowledged that Petitioner Sam B. McQueen ("McQueen"), like the owner in *Lucas*, has suffered "a total taking." *Id.* at 4a. Yet the court denied compensation based on a novel and expansive conception of the public trust doctrine. That rule supposedly allows the state to assert "the exclusive right to control land below the high water mark for the public benefit" and to prohibit "activity that substantially impairs the public interest in marine life, water quality, or public access." *Id.* at 6a. The court invoked this sweeping rule to justify the uncompensated confiscation of two small residential lots, situated in a fully-developed neighborhood, whose status as tidelands is largely based on the presence of certain species of plants that the government has conceded are "well established in a season." R. 175.[1]

The conflict with this Court's decisions is particularly acute because the South Carolina court failed to mention, much less apply, the objective criteria for a relevant

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[1] Citations to "R" refer to the official Record on Appeal.

background principle of law set forth in *Lucas* and *Palazzolo*. Indeed, the court made no attempt to reconcile its conception of the public trust doctrine as a background principle of law with South Carolina's historic reliance on the private ownership of tidelands. *See State* v. *Hardee*, 193 S.E.2d 497, 503–04 (S.C. 1972) (Bussey, J., concurring). The decision below threatens to nullify *Lucas* by encouraging lower courts to deny compensation based on dubious legal principles. This Court's review is therefore necessary to assure the continuing vitality of *Lucas*.

STATEMENT OF THE CASE

1. This case presents a claim by McQueen for "just compensation," as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. *See Chicago, B. & Q.R. Co.* v. *City of Chicago*, 166 U.S. 226, 241 (1897). Since October 1994 a final regulatory order has permanently deprived him of the right to use his land. R. 17. Nonetheless, South Carolina refuses to compensate him for what the South Carolina Court of Appeals has rightly called "a textbook taking." Pet. App. 34a.

In 1961 and 1963 McQueen bought two small noncontiguous lots of real property in fee simple, located in North Myrtle Beach, South Carolina. R. 244–45, 255–56, 2. Since buying these lots, McQueen has regularly paid taxes on them. *Id.* at 2. When purchased, the property was zoned for residential use, and McQueen later testified that "[w]hen I get financially able I would like to build a house on one of them." *Id.* at 243, 206. Next to each parcel runs a manmade saltwater canal. *Id.* at 12. Lots surrounding McQueen's property have houses

and bulkheads,[2] which guard the land from erosion by the canals. *Id.* at 3, 335. McQueen's lots are two of the only empty plots of land left in that area of town. *Id.* at 2.

In 1977, more than a decade after McQueen bought his land, South Carolina enacted the Coastal Zone Management Act ("CZMA"). S.C. Code Ann. §§ 48-39-10–220 (1994). Its aims were "to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State." *Id.* at § 48-39-30(A). The CZMA makes it unlawful to "fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit . . . ." *Id.* at § 48-39-130(C). Building "any structure" in a "critical area" is a crime. A first offense carries a sentence of up to six months' imprisonment and a $5000 fine; each additional offense potentially carries one year's imprisonment and a $10,000 fine. *Id.* at § 48-39-170(A). The CZMA also authorizes civil penalties of $100–$1000 per day of violation. *Id.* at § 48-39-170(C).

In compliance with the CZMA, McQueen applied on July 12, 1991 with the OCRM for permits to construct a bulkhead on each lot for erosion control. R. 2–3, 237, 251. On January 21, 1992 the OCRM issued a permit for one lot[3] but failed to respond to McQueen's permit application on the other. *Id.* at 3, 223. In a letter dated April 2, 1993, 21 months after he submitted his original permit applications, the OCRM instructed McQueen that "the

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[2] A bulkhead is defined by statute as "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline." S.C. Code Ann. § 48-39-270(1)(b) (2003).

[3] This January 1992 permit was statutorily out of time, because it was issued more than 90 days after McQueen filed his application. S.C. Code § 48-39-150(c) (1994). Indeed, the OCRM never met this mandatory deadline for any application in this case. R. 3, 4.

only way to correct this confusion" was to "submit a new application." *Id.* at 353 (emphasis added).

Undeterred by the OCRM's errors, McQueen reapplied on June 4, 1993 for permits to construct bulkheads and to add fill behind the bulkheads for "a level surface on which to build." *Id.* at 287, 280, 313. The OCRM denied these applications on September 13, 1993.[4] *Id.* at 283, 316, 4. No permits would be issued, the agency said, because "[t]he proposed bulkhead is located well into the tidelands critical area, so that any backfill results in the filling of tidal wetlands." *Id.* at 283, 316. McQueen's lots were deemed "tidal wetlands" based on the presence of saltwater tolerant plants, *id.* at 152–54, 159, which the OCRM admitted can become "well established in a season," *id.* at 175, and tidal flow on portions of one lot. *Id.* at 166–67. Denying the permits was also based on the "cumulative impact" of letting similarly situated owners build a bulkhead and add backfill to land like McQueen's. *Id.* at 162, 171. The OCRM further stated that "since the application seeks to fill a single family lot, there is no overridding [sic] public interest for this activity." *Id.* at 283, 316. As the OCRM later conceded, its denial of the permits had the effect of totally prohibiting development on McQueen's land. *Id.* at 146–47, 199–200.

McQueen pursued administrative appeals that ended with a "Final Administrative Order," which the Coastal Zone Management Appellate Panel issued on October 7, 1994. *Id.* at 17. The Panel upheld the OCRM's original

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[4] Out of the gauntlet of agencies whose permission the law required McQueen to obtain—the U.S. Army Corps of Engineers, the South Carolina Department of Health and Environmental Control, the South Carolina Ports Authority, the South Carolina Department of Archives and History, and the South Carolina Department of Wildlife and Marine Resources—only the OCRM refused McQueen permission to construct bulkheads. R. 283, 316, 4.

permit denials and rejected McQueen's claim that this action imposed a taking. *Id.* at 22–23.

2. McQueen filed a complaint in the South Carolina Court of Common Pleas, *id.* at 31; *see* S.C. Code Ann. § 48-39-180 (1994), alleging that the OCRM's permit denials imposed a "taking without compensation." R. 33–34; S.C. Code Ann. § 48-39-180 (1994). The court referred the case to a Master-in-Equity,[5] Pet. App. 42a, who ruled that, under *Lucas*, McQueen had suffered "a taking of private property under the Fifth Amendment of the United States Constitution." *Id.* Based on McQueen's testimony that he had received offers of $50,000 per lot, *id.* at 52a, 53a, the master ordered the OCRM to pay McQueen $100,000 compensation. *Id.* at 53a.

3. The South Carolina Court of Appeals affirmed the master's ruling that the OCRM's permit denials imposed a categorical taking. *Id.* at 35a. Indeed, the court held that because the OCRM's permit denials left McQueen's property with no economically beneficial use, "McQueen has suffered *a textbook taking*." *Id.* at 34a (emphasis added). Because the court found that McQueen's testimony was insufficient by itself to support the compensation award, however, the court remanded to determine the amount of compensation. *Id.*

4. On appeal, the Supreme Court of South Carolina reversed solely because McQueen "failed to demonstrate the distinct investment-backed expectations required to find a taking." *Id.* at 21a. The court found it "*uncontested* [that] the permit denial at issue here deprives respondent of all economically viable use of his property." *Id.* at 12a

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[5] South Carolina procedures authorize the Court of Common Pleas to refer a case to a master "where the parties consent." S.C. R. Civ. P. 53(b) (1993). Unless the order of reference contains specific limitations on his authority, "the master has and shall exercise the power and authority of the court sitting without a jury." *Id.* at 53(c).

(emphasis added). The court also rejected the OCRM's attempt to identify a background principle of law as a defense to McQueen's claim. In the court's view, the OCRM's asserted principle—"'[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others,'" *id.* at 14a (quoting *Carter* v. *South Carolina Coastal Council*, 314 S.E.2d 327, 329 (S.C. 1984), *in turn quoting Just* v. *Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972))—was overruled by *Lucas*. *Id.* at 16a. The court also declined to address other background principles of law asserted by *amici curiae*, including the public trust doctrine, "[b]ecause these arguments were not made to the lower courts, and because we reverse on other grounds." *Id.* at 13a n.2. Notwithstanding McQueen's total loss and the state's failure to identify a valid background principle of law, the court denied McQueen's claim solely based on his alleged "lack of investment-backed expectations." *Id.* at 21a.

5. McQueen filed a petition for certiorari with this Court, which issued a GVR order directing the state court to reconsider its ruling in light of *Palazzolo*. *Id.* at 8a. Instead of complying, the Supreme Court of South Carolina ordered the parties to brief three questions unrelated to this Court's holding in *Palazzolo*. *Id.* at 63a. McQueen filed a Motion to Amend asking the court to include the question of whether the court's initial judgment could withstand the reasoning and holding of *Palazzolo*. *Id.* at 60a. McQueen pointed out that "the Supreme Court's mandate . . . calls on this Court to determine what effect *Palazzolo* had on its prior decision in this case." *Id.* at 61a. The OCRM agreed that this question needed to be addressed. *Id.* at 58a. However, the South Carolina court denied the motion, vacated its first briefing order, and directed the parties to brief three revised questions that still failed to address the question involving *Palazzolo*: "I. Did the Court of Appeals err in

finding Coastal Council's regulation deprived McQueen of all economically valuable use of his property?" "II. If not, do background principles within South Carolina property or nuisance law absolve the State from compensating McQueen?" "III. If not, may a court use investment-backed expectations to determine McQueen's damages?" *Id.* at 55a–56a.

6. On remand, the Supreme Court of South Carolina unanimously denied McQueen's takings claim. *Id.* at 7a. The court again found it "*uncontested* that McQueen's lots retain no value and therefore a *total taking* has occurred." *Id.* at 4a (emphasis added). While acknowledging that this Court's remand was based on *Palazzolo*, *id.* at 3a, the South Carolina court reduced to a footnote its substantive discussion of the relationship between *Palazzolo* and the vacated judgment. *Id.* at 4a n.5. The court opined that *Palazzolo* does not resolve whether a categorical takings claim under *Lucas* requires proof of an owner's reasonable investment-backed expectations. *Id.* But the court backed away from deciding this question, "[i]n light of [its] disposition on the threshold issue of background principles of state law . . . ." *Id.*

The court then turned to the public trust doctrine, which it adopted as the ground of decision in this case for the first time on remand. The court framed the doctrine in these terms: "The State has the exclusive right to control land below the high water mark for the public benefit . . . and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." *Id.* at 6a (citations omitted). Based on its inference that "[t]he tidelands included on McQueen's lots are public trust property subject to control of the State," the court reasoned that "McQueen's ownership rights do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he

cannot otherwise do." *Id.* at 7a. Accordingly, the court held, "no compensation is due." *Id.*

REASONS FOR GRANTING THE WRIT

"[T]he Fifth Amendment's Property Clause [is] more than a pleading requirement, and compliance with it [is] more than an exercise in cleverness and imagination." *Nolian* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987). The Supreme Court of South Carolina has demonstrated more cleverness than compliance, however, by disregarding this Court's order to reconsider the case in light of *Palazzolo* and by invoking a new and expansive conception of the public trust doctrine to disguise its unwillingness to compensate even an admitted "total taking." Pet. App. 4a. For these and other reasons, fully set out below, the petition should be granted.

I. THE SUPREME COURT OF SOUTH CAROLINA DISREGARDED THIS COURT'S MANDATE TO RECONSIDER THE CASE IN LIGHT OF *PALAZZOLO* v. *RHODE ISLAND*.

This Court issued a GVR order directing the Supreme Court of South Carolina to conduct proceedings "for further consideration in light of *Palazzolo* v. *Rhode Island* . . . ." *Id.* at 8a. That order obligated the South Carolina court to consider how *Palazzolo* might affect its prior judgment. *See, e.g.*, *United States* v. *M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992) (holding that a GVR "merely required the court to reconsider its opinion in *M.C.C. I* in light of the law set forth in *Tull*."); *Hughes Aircraft Co.* v. *United States*, 140 F.3d 1470, 1474 (Fed. Cir. 1998) (holding that "the scope of our review on remand is limited to determining whether *Hughes VII* satisfies the legal analysis required by *Warner-Jenkinson*"); *Nationwide Mut. Ins. Co.* v. *Clay*, 525 So.2d 1339, 1341 (Ala. 1988) (stating that by the GVR mandate the court is "required to review the issues in the instant litigation in light of the principles enunciated in *Lavoie*").

Such a remand order assuredly did "not . . . nullify all prior proceedings." *Id.*; *see also Robinson* v. *Ariyoshi*, 854 F.2d 1189, 1190 (9th Cir. 1988) (rejecting the contention that "the Supreme Court's decision to remand the case on one narrow question reopens the whole case for reconsideration of all issues that have arguably been changed by state law in the interim."). Treating a case on remand from a GVR as a blank slate not only exceeds the narrow scope of the mandate, it deprives the party that obtained the remand of its "rightful sense of repose and frustrate[s] the judicial system's core principles of finality and efficiency." *Kotler* v. *Am. Tobacco Co.*, 981 F.2d 7, 13–14 (1st Cir. 1992).

Nevertheless, the Supreme Court of South Carolina responded to this Court's mandate by devising three unrelated questions of its own and ordering the parties to brief them. Pet. App. 63a. The order omitted any reference to the effect of *Palazzolo* on the court's prior judgment. *Id.* Worse yet, the court denied McQueen's motion to amend the briefing order to include that question, even though the parties substantially agreed on the need to do so. *Id.* at 55a. By denying McQueen's motion to amend the briefing order, the court effectively announced its intention to use the remand to "reopen[ ] the whole case for reconsideration on all issues . . . ." *Robinson*, 854 F.2d at 1190.

Indeed, of the three questions posed by the court, two reopened matters—whether McQueen had been deprived of "all economically valuable use" of his property and whether the OCRM could identify a valid background principle of law—on which McQueen had prevailed in the initial decision. *Compare* Pet. App. 55a–56a *with id.* at 12a, 16a. Apart from the unfairness of compelling McQueen to wage a new battle for ground he had already won, this mode of proceeding manifested the South Carolina court's determination to avoid deciding the question on which the remand was based.

The opinion below amply confirms this understanding. While paying lip service to *Palazzolo*, the court relegated to a footnote its substantive discussion of the relationship between *Palazzolo* and the court's vacated judgment. *Id.* at 4a n.5. Moreover, the court firmly refused to apply *Palazzolo* to the decisive question of background principles of law in spite of the important guidance that decision contains. *See infra* at 16.

These facts securely establish that the Supreme Court of South Carolina disregarded this Court's mandate. The South Carolina court did not merely stumble in responding to the GVR, as the denial of McQueen's motion demonstrates. The court did not neglect *Palazzolo* for some extraneous reason like the passage of new legislation or a factual development in the case. Nor did the court travel beyond the narrow confines of its mandate after determining that considering its earlier judgment in light of *Palazzolo* required it to resolve an antecedent or subsidiary question. Disregard for this Court's mandate is the only available explanation for the South Carolina Supreme Court's failure to limit its review to the effect of *Palazzolo* on its earlier judgment.

Such waywardness threatens the integrity of the GVR order as an "integral part of this Court's practice." *Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam). Not surprisingly, then, this Court has granted review to correct a lower court's failure to obey a GVR. *See Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam) (granting certiorari and reversing a decision of the Supreme Court of South Carolina for failing to apply the decision on which the GVR was based); *Yates* v. *Aiken*, 484 U.S. 211, 214 (1988) (granting certiorari out of a concern that "the South Carolina Supreme Court had

not fully complied with our mandate" in the GVR order).[6] *Henry* and *Aiken* establish that a GVR is as binding on state courts as any other mandate. Certiorari is merited in this case because the Supreme Court of South Carolina defied this Court's mandate.

Moreover, the lower court's defiance laid the foundation for its decision on the merits. By directing the parties to brief the question of background principles of law, the South Carolina court in effect invited the OCRM to reargue a conception of the public trust doctrine that the court had previously rejected because it had been advanced only by an *amicus curiae*. Pet. App. 13a n.2. Not surprisingly, the court executed a perfect 180° turn by invoking the same principle to support its second denial of compensation. *Id.* at 5a–7a. However, the South Carolina court's conception of the public trust doctrine is irreconcilable with this Court's decisions in *Lucas* and *Palazzolo*, which emphasize the objective constraints placed on the definition of a relevant background principle of law.

II. THE SOUTH CAROLINA SUPREME COURT'S DENIAL OF COMPENSATION BASED ON A NOVEL AND EXPANSIVE CONCEPTION OF THE PUBLIC TRUST DOCTRINE CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *LUCAS* AND *PALAZZOLO*.

The Supreme Court of South Carolina denied compensation for a "total taking" based on a purported

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[6] In *Henry* and *Aiken* the Court remedied the lower court's failure to comply with a GVR by resolving the question contained in the remand order. *See Henry*, 376 U.S. at 777; *Aiken*, 484 U.S. at 215. In this case, however, the Court should grant review on the public trust doctrine question, because the South Carolina Supreme Court did not merely ignore the GVR order, it dramatically altered its ground of decision and issued a broad ruling under the Fifth Amendment.

background principle of law that the court adopted for the first time on remand. Not only the circumstances of this holding, but its substance, bring it into sharp conflict with this Court's decisions under the Fifth Amendment. Because it disregards the limits placed by this Court on the definition of a relevant background principle of law, the decision below threatens to nullify the categorical rule of *Lucas* by allowing courts to deny compensation for a confiscatory regulation by simply redefining the owner's property rights. Such an unmistakable conflict with this Court's constitutional decisions calls for review.

More than a decade ago this Court reversed another regulatory takings decision of the Supreme Court of South Carolina in *Lucas* and applied the rule that controls this case: "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019.

Despite the compelling simplicity of the categorical rule—"total regulatory takings must be compensated," *id.* at 1026—the South Carolina Supreme Court has refused to apply it in this case. Such resistance does not stem from any doubt that McQueen has suffered a complete loss. The court has twice found the fact of confiscation to be "uncontested." Pet. App. 4a, 12a.[7] Yet the court

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[7] In its initial (now vacated) decision the court held, "It is uncontested the permit denial at issue here deprives respondent of all economically viable use of his property." Pet. App. 12a. The decision below similarly held that "we accept as uncontested that McQueen's lots retain no value and therefore a total taking has occurred." *Id.* at 4a. Whether stated in terms of use or value, the South Carolina Supreme Court has unambiguously and repeatedly found that McQueen's loss is complete. He is therefore entitled to invoke the categorical rule of *Lucas*.

managed to deny the force of the rule and concluded that "no compensation is due." *Id.* at 7a, 21a.

This time[8] the court's explanation for denying compensation rests on a novel and expansive conception of the public trust doctrine: "The State has the exclusive right to control land below the high water mark for the public benefit . . . and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." *Id.* at 6a (citations omitted). With no other support, the court inferred that because McQueen's land is statutorily deemed to be tidelands—certain forms of saltwater-tolerant grass thrive on his property—"the State need not compensate [McQueen] for the denial of permits to do what he cannot otherwise do." *Id.* at 7a.

This staggeringly broad conception of the public trust doctrine cannot be a valid defense to McQueen's confiscatory takings claim. It is true that South Carolina may avoid compensation, even for a confiscatory regulation, if supported by "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. However, *Lucas* explained that, while lower courts enjoy "some leeway" in identifying "*relevant* background principles," that flexibility has limits. *Id.* at 1032 n.18, 1030 (emphasis added).

In particular, *Lucas* "stress[ed] that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found."

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[8] In its first decision, the court justified its denial of compensation based not on a background principle of law, but on McQueen's alleged failure "to demonstrate the distinct investment-backed expectations required to find a taking." Pet. App. 21a.

Id. at 1032 n.18. *Palazzolo* echoed this view, stating that "[t]he determination whether an existing general law can limit all economic use of property must turn on *objective factors*, such as the nature of the land use proscribed." 533 U.S. at 630 (citing *Lucas*, 505 U.S. at 1030) (emphasis added).[9]

Naturally, then, the Court specified those "objective factors" that should be analyzed in conducting the "'total taking' inquiry." *Id.*; 505 U.S. at 1030. These include (1) "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities"; (2) "the social value of the claimant's activities and their suitability to the locality in question"; (3) "the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike"; (4) whether "a particular use has long been engaged in by similarly situated owners . . . (though changed circumstances or new knowledge may make what was previously permissible no longer so)"; and (5) whether "other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Id.* at 1030–31 (citing Restatement (Second) of Torts §§ 826, 827, 828(a) and (b), 831, 827(e), 828(c), 830, 827 cmt. g (1979)).

Nor do these factors comprise the Court's only guidance. A relevant background principle of law "cannot be newly legislated or decreed (without compensation)." *Id.* at 1029. And it cannot be a "conclusory assertion" based on "a common-law maxim such as *sic utere tuo ut*

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[9] *Palazzolo* further underscored the objective nature of the background principles of law inquiry: "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title." *Palazzolo*, 533 U.S. at 629–30. As the Court explained, "[t]his relative standard would be incompatible with our description of the concept in *Lucas* . . . ." *Id.* at 630.

alienum non laedas," *id.* at 1031, or a "blanket rule that purchasers with notice have no compensation right when a claim becomes ripe." *Palazzolo*, 533 U.S. at 628. Such glib defenses forge "too blunt an instrument to accord with the duty to compensate for what is taken." *Id.*

A relevant background principle of law "must inhere in the title itself," thereby reflecting "the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas*, 505 U.S. at 1029, 1027.[10] In sum, the kind of principle that can justify the uncompensated confiscation of private property must express one of "those common, shared understandings of permissible limitations derived from a State's legal tradition." *Palazzolo*, 533 U.S. at 630. The Court added this caution: "It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land." *Lucas*, 505 U.S. at 1031 (citation omitted).

None of these principles was mentioned, much less applied, by the South Carolina Supreme Court. The decision below leaps from a cursory explanation of the holding of *Palazzolo* to a discussion of the public trust doctrine as a principle of state law. Pet. App. 5a. Curiously, the decision omits any reference to *Palazzolo's* discussion of background principles of law despite the court's acknowledgement that *Palazzolo* was meant to guide the remand. *Id.* at 3a. Indeed, the court admitted no limit to the principles that could be invoked to defend

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[10] When McQueen bought his land, South Carolina law supported the right of a landowner—even of tidelands—to protect land from erosion. *See Lane* v. *McEachern*, 162 S.E.2d 174, 176 (S.C. 1968) (holding that the private owner of tidelands has the right to maintain artificial banks enclosing the land).

the OCRM's refusal to compensate McQueen. Having discovered a malleable principle of law in the public trust doctrine, the South Carolina court evidently decided to look no further.

The decision below thus threatens to nullify the categorical rule of *Lucas*. If the South Carolina Supreme Court is free to disregard objective constraints on the inquiry into background principles of law, other courts can be expected to follow suit. In that event, the categorical rule would pose no meaningful or durable barrier to the uncompensated confiscation of private property, because in asking a state court to determine whether state law supplies a defense to a regulatory taking, "the State's self-interest is at stake." *United States Trust Co. of N.Y.* v. *New Jersey*, 431 U.S. 1, 26 (1977). Owners seeking compensation would be left to the tender mercies of courts with the common law power to refashion property law by extinguishing even a fee simple estate. Through this convenient method, a court could deny compensation for the most unmistakable loss, just as the South Carolina court has done here. The conflict between the decision below and this Court's regulatory takings decisions could not be sharper.

In addition, the Supreme Court of South Carolina simply erred. Properly applied, the constraints set forth in *Lucas* and *Palazzolo* would have prevented the Court from denying McQueen's claim based on the public trust doctrine. Far from reflecting "an *objectively reasonable application*" of South Carolina law,[11] 505 U.S. at 1032

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[11] An "*objectively reasonable application*" of South Carolina law would have precluded the OCRM from asserting the public trust doctrine on remand. *Lucas*, 505 U.S. at 1031 n.18. South Carolina law contains a "long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C.* v. *Town of Mt. Pleasant*,

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n.18, the court's conception of the public trust doctrine was unprecedented in scope and in its application as a defense to a federal takings claim.

The South Carolina Supreme Court's conception of the public trust doctrine was adopted by the court for the first time on remand. *Compare* Pet. App. 5a–7a *with id.* at 13a n.2. Moreover, its application as a defense to a categorical taking appears to be entirely new under South Carolina law. *Compare id.* at 5a–7a *with Lucas* v. *South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992) (stating that the court could not identify "any common law basis . . . by which it could restrain Lucas's desired use of his land . . . ."). And this broad conception of the public trust doctrine appears to have shallow historical roots, even outside the takings context. *See Lane*, 162 S.E.2d at 176 (holding that the private owner of tidelands has the right to maintain artificial banks enclosing the land). In particular, the decision below makes no effort to reconcile the imposition of confiscatory restrictions on all land below the high water mark with the importance

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526 S.E.2d 716, 724 (S.C. 2000). Consistently and strictly applied, *see, e.g., Smith* v. *Phillips*, 458 S.E.2d 427, 429 (S.C. 1995), the South Carolina Supreme Court has applied this rule against a landowner in a regulatory takings case. *Grant* v. *South Carolina Coastal Council*, 461 S.E.2d 388, 392 (S.C. 1995). Yet the court did not evenhandedly apply the rule to the OCRM, as required when adjudicating a federal claim. *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923). Instead, the court issued an open-ended invitation to identify "background principles within South Carolina property or nuisance law [that] absolve the State from compensating McQueen." Pet. App. 55a. Even worse, the court posed this question despite its prior decision not to reach the public trust doctrine, in part, "[b]ecause these arguments were not made to the lower courts." *Id.* at 13a n.2. The court thus reached the question of the public trust doctrine only by giving the state a free pass regarding a procedural rule that the court has strictly enforced in other cases. Far from reflecting an objective understanding of state law, the decision below bespeaks the exercise of raw judicial power.

historically placed on the private ownership of tidal wetlands in South Carolina:

> Historically in this State from its beginnings in 1670, tidelands, as opposed to submerged lands, were treated by Lords Proprietors, the Crown and the State of South Carolina as vacant lands subject to grant and private ownership as any other vacant lands, for at least 200 years, until the adoption of certain limitations following the discovery of phosphate beds. Indeed, it is an historical fact that *the economic welfare of the State throughout much of its history was largely dependent upon the cultivation of rice lands which were lawfully granted, privately owned tidelands.*

State v. *Hardee*, 193 S.E.2d 497, 504 (S.C. 1972) (Bussey, J., concurring in result) (emphasis added).

Any principle of law so directly at odds with a state's legal tradition cannot be a relevant background principle of law under *Lucas* and *Palazzolo*.[12] The South Carolina

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[12] Of course, the South Carolina Supreme Court's decision is inconsistent not only with *Lucas* and *Palazzolo*, but with a long line of decisions holding that "[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago, R.I. & P. R. Co.* v. *United States*, 284 U.S. 80, 96 (1931); *accord United States* v. *Causby*, 328 U.S. 256, 261 (1946); *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 138 n.36 (1978); *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980); *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984). By denying compensation based only on the level of the tide, the decision below is also inconsistent with *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), which held that the federal navigational servitude does not "create[ ] a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation." *Id.* at 172–73). More generally, forcing McQueen to sacrifice the right to use his land, for the good of "all the people of the State," S.C. Code Ann. § 48-39-30(A) (1994), is inconsistent with the Fifth Amendment's aim "to bar Government from forcing some people alone to bear public burdens

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Supreme Court's decision plainly reflects an effort to avoid the constitutional duty to pay compensation rather than "an *objectively reasonable application* of relevant precedents." *Lucas*, 505 U.S. at 1032 n.18.

III. USE OF THE PUBLIC TRUST DOCTRINE AS A DEFENSE TO A REGULATORY TAKINGS CLAIM IS AN IMPORTANT AND RECURRING ISSUE OF CONSTITUTIONAL LAW.

The question presented is undoubtedly an important question of federal constitutional law. It challenges the Supreme Court of South Carolina's conclusion that an expansive version of the public trust doctrine qualifies as a background principle of law under *Lucas*. A background principle of law forms the government's single potential defense to a confiscatory takings claim. *Lucas*, 505 U.S. at 1032 n.18. As such, the question presented is a question of federal law rooted in the Fifth Amendment. *Howlett* v. *Rose*, 496 U.S. 356, 375 (1990) ("The elements of, and the defenses to, a federal cause of action are defined by federal law.") (citations omitted).

Although "the law of real property is, under our Constitution, left to the individual States to develop and administer," *Hughes* v. *Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring), it would be a mistake to view the public trust doctrine in this context as a matter for state courts to administer without federal oversight. The Takings Clause precludes a state from denying compensation (at least for a confiscatory regulation) on the specious ground that the property right no longer exists. *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998); *Loretto* v. *Teleprompter Manhattan CATV*

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which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

Corp., 458 U.S. 419, 439 (1982). Accordingly, members of the Court have noted that the background principles of law defense presents a federal question that may require scrutiny of decisions nominally rendered under state law. *Bush* v. *Gore*, 531 U.S. 98, 115 n.1 (2000) (Rehnquist, C.J., concurring); *Stevens* v. *City of Cannon Beach*, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from the denial of certiorari).[13]

The decision below is also important because of its broad practical effects. The U.S. Fish & Wildlife Service has reported that "[t]he 4,104,850 acres . . . of wetlands in South Carolina make up approximately 21 percent of the land surface area of the State." T.E. Dahl, U.S. Fish & Wildlife Service, South Carolina's Wetlands: Status and Trends, 1982–1989, at 36 (1999). In addition, the Service estimates that "[o]ver 91.0 percent of South Carolina's wetland acreage is in private ownership." *Id.* at 35.

Based on the Service's figures, approximately 374,234 acres[14] of South Carolina wetlands fit the description of McQueen's land. The South Carolina Supreme Court's conception of the public trust doctrine—"[t]he State has the exclusive right to control land *below the high water mark* for the public benefit," Pet. App. 6a (citations

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[13] This need to police the application of *Lucas* follows from the familiar principle that the Court, in its exercise of judicial review, must sometimes probe state law to determine whether a federal right has been denied contrary to federal law. *See, e.g., Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623–26 (1813) (examining Virginia legislation to determine whether it escheated private property in violation of the federal Treaty of 1794); *Trustees of Dartmouth College* v. *Woodworth*, 17 U.S. (4 Wheat.) 518, 650–54 (1819) (construing New Hampshire statutes to determine whether they denied a college's rights under the Contracts Clause).

[14] This estimate is the product of the amount of estuarine emergent wetlands (411,246 acres) and the percentage of wetlands held in private hands (91%). Dahl, at 35, 36.

omitted) (emphasis added)—thus implicates hundreds of thousands of acres of private property. With the "exclusive right to control" this land, the South Carolina Supreme Court has asserted the state's power to (1) prohibit "activity that substantially impairs the public interest in marine life, water quality, or public access" and (2) deny a constitutional claim for compensation even when that prohibition rises to the level of total confiscation. *Id.* at 6a, 7a. A decision with such vast practical effects deserves review.

Review also should be granted because the question presented is a recurring issue of national importance that only this Court can finally resolve. The extent to which the public trust doctrine supplies a valid defense to a regulatory takings claim is a recurring issue in both federal and state courts.[15] This question can be expected to recur, if only because regulatory takings cases are "among the most litigated and perplexing in current law." *Eastern Enterp.* v. *Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Several reasons favor granting review in this case rather than awaiting another vehicle to resolve the question presented. Jurisdiction lies with the Court and McQueen has standing to bring this action. The decision below represents a final judgment that rests on a single ground of decision under federal constitutional law. *See*

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[15] *See, e.g., Esplanade Properties, LLC* v. *City of Seattle*, 307 F.3d 978, 987 (9th Cir. 2002), *cert. denied* 123 S. Ct. 2574 (2003); *Tulare Lake Basin Water Storage Dist.* v. *United States*, 49 Fed. Cl. 313, 321–22 (Fed. Cl. 2001); *Orion Corp.* v. *State*, 747 P.2d 1062, 1082–83 (Wash. 1987); *R.W. Docks & Slips* v. *State*, 628 N.W.2d 781, 787–89 (Wis. 2001).

Pet. App. 7a. No further proceedings will be held in the South Carolina courts in this case unless this Court intervenes. A decision on the merits for McQueen therefore offers his only avenue of relief.

No relevant factual disputes divide the parties at this stage of the proceedings. The crucial fact of total confiscation is "uncontested." *Id.* at 4a (footnote omitted). There is no dispute that saltwater tolerant plants grow on McQueen's lots. If the South Carolina Supreme Court's conception of the public trust doctrine is a relevant background principle of law, the breadth of that principle embraces McQueen's land. Absent relevant factual disputes, this case presents a pure question of federal law that this Court can readily resolve.

Moreover, this case labors under none of the technical disputes typical of regulatory takings cases. McQueen's claim is ripe. Given the OCRM's final order denying McQueen's permit applications, R. 17, "there [is] no question here about how the 'regulations at issue [apply] to the particular land in question.'" *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997) (quoting *County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 191 (1985)). No denominator problem, *see Lucas*, 505 U.S. at 1016 n.7, lurks in the distance. The Master-in-Equity ruled that the OCRM's permit denials affect 100% of each of McQueen's lots. Pet. App. 52a, 53a.

Finally, the decision below was no aberration. The South Carolina Supreme Court has an unfortunate history of denying regulatory takings claims based on various "blanket exception[s] to the Takings Clause," *Kaiser Aetna*, 444 U.S. at 172.[16] Indeed, on no fewer than

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[16] *See, e.g.*, Pet. App. 21a (denying a takings claim under *Lucas* because the owner allegedly lacked reasonable investment backed expectations); *Wooten* v. *South Carolina Coastal Council*, 510 S.E.2d

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10 occasions since the decision on remand from this Court in *Lucas* (including the decision below), the South Carolina Supreme Court has decided claims under *Lucas*—every one of which the court denied, even if doing so required the reversal of lower court decisions in the owner's favor.[17] This unbroken pattern of decisions in favor of the state, together with a specific disregard for the Court's mandate in this case, suggests that nothing short of plenary review and direct reversal will insure South Carolina's adherence to this Court's regulatory takings decisions.[18]

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716, 718 (S.C. 1999) (denying a takings claim under *Lucas* because the owner acquired title after enactment of the regulation); *Rick's Amusement, Inc.* v. *State*, 570 S.E.2d 155, 159 (S.C. 2001) (denying a takings claim under *Lucas* because the property interest in video gambling machines occurs in a highly regulated industry).

[17] Pet. App. 9a, 21a (reversing a South Carolina Court of Appeals holding that the owner had suffered a categorical taking under *Lucas*); *Sea Cabins on the Ocean IV Homeowners Ass'n* v. *City of North Myrtle Beach*, 548 S.E.2d 595, 604 (S.C. 2001) (reversing a Circuit Court holding that the owner had suffered a categorical taking); *Wooten*, 510 S.E.2d at 718 (same); *Rick's Amusement, Inc.*, 570 S.E.2d at 159 (denying a takings claim under *Lucas*); *Main* v. *Thomason*, 535 S.E.2d 918, 924 (S.C. 2000) (same); *Westside Quik Shop, Inc.* v. *Stewart*, 534 S.E.2d 270, 274 (S.C. 2000) (same); *Quality Towing, Inc.* v. *City of Myrtle Beach*, 530 S.E.2d 369, 373 (S.C. 2000) (same); *Grant* v. *South Carolina Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995) (same); *Long Cove Club Assocs., L.P.* v. *Town of Hilton Head Island*, 458 S.E.2d 757, 758 (S.C. 1995) (same).

[18] South Carolina is not alone in its resistance to the *Lucas* decision. *See, e.g.*, *Cooley* v. *United States*, 324 F.3d 1297, 1304–05 (Fed. Cir. 2003) (declining to apply *Lucas* even when a trial court found that the denial of a wetlands fill permit extinguished 98.8% of the owner's property value); *Landgate* v. *Cal. Coastal Comm'n*, 953 P.2d 1188, 1212 (Cal. 1998) (Brown, J., dissenting) (stating with regard to the denial of a *Lucas* claim that "[i]n these limited circumstances, government must turn square corners—except in California"); *Stevens* v. *City of Cannon Beach*, 854 P.2d 449, 460 (Or. 1993) (holding

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CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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JULY 28, 2003

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that the doctrine of custom applies to all dry sand areas along Oregon's coastline and qualifies as a background principle of law justifying the denial of a *Lucas* claim); *Wilson* v. *Commonwealth*, 597 N.E.2d 43, 46 (Mass. 1992) (expressing doubt whether *Lucas* applied to the takings claim of owners whose property the court admitted to be worthless).